No. 22-2925

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Sekema Gentles,

Plaintiff-Appellant,

v.

Borough of Pottstown, et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Pennsylvania
Case No. 2:19-CV-00581

REPLY BRIEF FOR PLAINTIFF-APPELLANT SEKEMA GENTLES

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Introduction

Officer Jeffrey Portock violated Sekema Gentles's Fourth Amendment rights when he stopped Gentles based on an anonymous call that provided no reasonable grounds to suspect criminal activity. Then, Portock and Officer Brandon Unruh again violated Gentles's rights by exceeding the lawful scope of a *Terry* stop when they handcuffed Gentles and locked him in a patrol car for twenty minutes while officers threatened Gentles's fiancée and children. After this incident, Portock maliciously prosecuted Gentles for the Pennsylvania crime of disorderly conduct by unreasonable noise.

Defendants attempt to justify their unlawful stop and subsequent disorderly conduct citation by myopically zooming in on a few facts: an anonymous phone call, Gentles's decision to leave after he noticed Portock approach him, and the presence of neighbors, including children, watching the encounter. These facts are insufficient to create reasonable suspicion for the stop or probable cause for the criminal citation. Defendants' tunnel vision also ignores other materially relevant facts, including that Portock saw nothing amiss when he responded to the anonymous call, that the events occurred during the day and not in a high-crime area, and that the officers escalated the situation by refusing to explain why they had stopped Gentles.

A jury could determine, based on all the facts, that the circumstances did not create reasonable suspicion for Portock to stop Gentles in the first

place or probable cause to issue Gentles a citation for disorderly conduct by unreasonable noise. This Court should reverse.

Argument

I. The district court erred in granting Defendants summary judgment on Gentles's unreasonable-seizure claim.

A. Portock seized Gentles before he asked for Gentles's identification.

The parties agree on three things: A seizure occurs when a person submits to an official show of authority; Portock showed his authority when he told Gentles he was not free to leave; and Gentles submitted by remaining in his vehicle and not driving away. Opening Br. 12-13; Defs. Br. 11-12. The only dispute concerns *when* Portock told Gentles he was not free to leave. Defs. Br. 12. This dispute matters because a court "must consider only 'the facts available to the officer at the moment of seizure'" when determining whether the seizure was supported by reasonable suspicion. *United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1986)).

Portock's incident report, written by Portock himself, states that he told Gentles not to leave *before* asking for Gentles's identification. JA 44. Gentles's deposition confirms this sequence of events. JA 55-56.

Defendants ignore this evidence. Instead, they point to a video that was filmed *after* Portock told Gentles he was not free to leave. Defs. Br. 12 (citing JA 88). Defendants use this video to argue that the seizure

started after Portock requested Gentles's identification and Gentles refused those requests. Defs. Br. 12. But that's a non sequitur because the video cannot contradict that the seizure occurred before the recording began. S*ee* JA 44; JA 88 (0:00-0:03).

B. Portock lacked reasonable suspicion of criminal activity when he seized Gentles.

Defendants claim that Portock had reasonable suspicion to seize Gentles based on the anonymous call and Portock's observations of Gentles. Neither the call nor Portock's observations provide reasonable suspicion.

1. The anonymous call did not contribute to reasonable suspicion.

Facts alleged in the call. We previously established that the anonymous call reporting that someone looked into garage windows and then drove off could not give rise to an inference of criminal activity. Opening Br. 15-20. Defendants concede that the caller "may not have accused Gentles of illegality" but argue that the call nonetheless "supports several potential crimes," which, tellingly, Defendants never identified in the district court: "trespassing, prowling, loitering, or casing a home for a burglary." Defs. Br. 15. That kind of vague reference with no citation is insufficient to raise an argument based on these potential crimes for the first time. *See Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023).

Reasonable suspicion can be formed by observing legal activity, but only when that activity "properly gave rise to the inference that criminal activity was afoot." *United States v. Ubiles*, 224 F.3d 213, 217 (3d Cir. 2000). Defendants have not identified what criminal statutes Portock could have suspected Gentles of violating. And looking through Pennsylvania law, the potential crimes Defendants suggest were not conceivably committed by Gentles.

Pennsylvania criminalizes loitering or prowling only when it occurs at night. 18 Pa. Cons. Stat. § 5506. Pennsylvania's trespassing law prohibits a person from entering or remaining inside a building in which he is not licensed or privileged to be or anywhere else he is not licensed to be for the purpose of threatening the owner, starting a fire, or defacing the premises. 18 Pa. Cons. Stat. § 3503. The call here, which reported that a Black man was looking into garage windows during the day, JA 44, could not give rise to a reasonable inference that loitering, prowling, or trespassing was occurring or was about to occur.

Likewise, the conduct alleged in the call could not have supported reasonable suspicion for burglary, which requires entering a building with criminal intent. 18 Pa. Cons. Stat. § 3502(a). The call alleged only that someone was looking into garage windows—not that someone had entered or even attempted to enter any buildings. JA 44. And looking through windows alone is not sufficient to create reasonable suspicion of burglary. *See Couden v. Duffy*, 446 F.3d 483, 494-95 (3d Cir. 2006).

Defendants acknowledge reasonable suspicion was lacking in *Duffy* but assert that *Duffy* is distinguishable because the plaintiff there looked into only one window, while Gentles (supposedly) looked into multiple windows. Defs. Br. 17-18. Defendants nowhere explain why this minor difference would have allowed Portock to infer that Gentles was a burglar, loiterer, or trespasser. *See* Defs. Br. 17-18. Nor do they point to any case to support their assertion that looking into more than one window is inherently suspicious. *See* Defs. Br. 17-18.

In fact, Portock had fewer reasons for suspicion than did the officers in *Duffy*. There, the officers were responding to a tip at night when they saw a person get out of a car, enter a garage, and look through a window into the house. *Duffy*, 446 F.3d at 489. If "[n]one of these facts [was] suggestive of unlawful conduct," *id.* at 495, the same must be true of the facts here, where Portock responded during the day to a report that someone had looked in garage windows and then left without entering any buildings, JA 44.

Defendants also try to explain away *Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003), by asserting that the facts here are "appreciably more suggestive of criminal activity." Defs. Br. 17. Not so.

In *Campbell*, a motel clerk who had recently been robbed was suspicious of an agitated individual who was acting nervously in the motel lobby at night and had no clear reason to be there. 332 F.3d at 202, 209. This Court found those circumstances insufficient to support

reasonable suspicion because the officer could not "enunciate[] a logical series of inferences that would lead a reasonable person to believe that [the individual] was about to undertake a specific crime." *Id.* at 210. Similarly, even though Defendants now identify "several potential crimes," Defs. Br. 15, no one has ever articulated what logical inferences would convert the anonymous report of Gentles's innocent behavior into a report of criminal activity.

Reliability of the caller. Nor was the tip sufficiently reliable to support reasonable suspicion. Defendants agree that *Brown*'s five-factor reliability test for anonymous tips applies, Defs. Br. 13; *see United States v. Brown*, 448 F.3d 239, 249-50 (3d Cir. 2006), and concede three factors, Defs. Br. 14, 16-17. The two remaining factors are insufficient to establish reliability.

One of the disputed factors is whether the caller "recently witnessed the alleged criminal activity." *Brown*, 448 F.3d at 249-50. Defendants assert that the call was reliable because the caller recently witnessed "the alleged criminal/suspicious activity." Defs. Br. 14. But a report of someone looking into garage windows, as already established, is not "alleged criminal activity." *Brown*, 448 F.3d at 249-50; *supra* at 3-6.

Still, Defendants maintain that the contemporaneous nature of the call renders it per se reliable under *Navarette v. California*, 572 U.S. 393 (2014). *See* Defs. Br. 16-17. But *Navarette* is off-point. The caller in *Navarette* was not simply an eyewitness but an eyewitness to criminal

wrongdoing because the person she had reported had just run her off the road. 572 U.S. at 399. The caller here did not have firsthand knowledge of any wrongdoing. *See* JA 44.

Defendants' use of *United States v. Wright*, 74 F.4th 722 (5th Cir. 2023), fails for much the same reason. Defs. Br. 17. The tipster there witnessed criminal activity—a drug deal—and therefore, like the tipster in *Navarette*, had firsthand knowledge of wrongdoing. *Wright*, 74 F.4th at 727.

The other *Brown* factor Defendants seemingly rely on concerns whether the information conveyed in the call would be available to the ordinary observer. Defs. Br. 16-17. As we've explained, under *Florida v. J.L.*, 529 U.S. 266, 271-72 (2000), officers cannot assess the reliability of tipsters who provide no predictive or nonpublic information. Opening Br. 19. Defendants argue that the tip here is more reliable because it was about publicly observable conduct, whereas the tip in *J.L.* was about criminal conduct that was not publicly observable (a concealed gun). Defs. Br. 16 (citing *J.L.*, 529 U.S. at 271-72). But the court in *J.L.* was concerned that the tipster did not have knowledge of concealed criminal activity, 529 U.S. at 272, and the same concern is present here where the caller here did not even allege criminal conduct, *see supra* at 3-6. Further, Defendants have it backwards: Tips are *less* reliable when their content is "information that would be available to any observer" because a public

observer does not necessarily have the inside information that would bolster a tip's reliability. *Brown*, 448 F.3d at 249.

Defendants' failed attempt to distinguish *J.L.* shows just how similar the two cases are. Defs. Br. 16-17. Defendants say the tip in *J.L.* "lacked *any* indicia of reliability beyond an accurate description of the suspect's identity." Defs. Br. 16. But the same is true here. Like the tipster in *J.L.*, our caller is "an unknown, unaccountable informant" who "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *J.L.*, 529 U.S. at 271. Portock has consistently noted that the caller's description of the car was accurate, JA 44; Defs. Mem. Supp. Mot. Summ. J., ECF 52-1, at 5; Defs. Br. 18, but, under *J.L.*, that doesn't matter: Reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." 529 U.S. at 272.

2. Portock's observations did not create reasonable suspicion.

As just explained, the anonymous tip alone did not provide reasonable suspicion. And that remains true after adding in Portock's observations. It is undisputed that Portock did not see any suspicious activity when he investigated the alley, *see* Opening Br. 21; Defs. Br. 2, nor do they dispute that Portock initially saw Gentles chatting with someone on the sidewalk, *see* Opening Br. 21; Defs. Br. 3. The only disputes center around Gentles's decision to leave once he noticed Portock approaching.

Before Portock saw Gentles. Defendants try to link the anonymous call to Portock's observations, but they ignore events that occurred before Portock saw Gentles. *See* Defs. Br. 18-19. Portock investigated the alley, found nothing suspicious, cleared the call, and returned to his patrol. JA 44. Any suspicion should have dissipated when Portock did not find anyone in the alley. And it seems that Portock's suspicions were in fact dispelled, given that he cleared the call and went back to his routine patrol instead of continuing his investigation. JA 44.

After Portock saw Gentles. Portock's observations after finding Gentles a mile away from the alley could not have furnished reasonable suspicion. *See* Opening Br. 21-24. Defendants respond by fixating on Gentles's decision to leave after noticing Portock. Defs. Br. 19. But that ignores the context in which Portock observed Gentles heading to his car.

Before Gentles went to his car, Portock saw Gentles chatting with someone on a public sidewalk during the day. JA 44, 61. And after Portock followed Gentles to his car, Portock saw that Gentles was accompanied by his fiancée Tiffany Flores and their two young children. *See* JA 57. In light of these facts, a jury could find that Gentles's decision to leave did not provide reasonable suspicion. *See* Opening Br. 21-23; *infra* at 12-13.

Even if these facts were not in the mix, Portock could not have had reasonable suspicion based on Gentles's decision to leave. Gentles walked away from Portock at his "normal gait," JA 84, and it is clearly

established that walking away from police officers, without more, cannot provide reasonable suspicion, *see* Opening Br. 23; *Johnson v. Campbell*, 332 F.3d 199, 208 (3d Cir. 2003). Each of Defendants' responses fails.

First, Defendants dispute Gentles's claim that he walked—rather than "rushed"—to his car by arguing his claim was supported merely by his own affidavit, which Defendants argue should be ignored because it was conclusory. Defs. Br. 22. Defendants acknowledge that affidavits are not conclusory when they include specific facts that support an inference contradicting an opposing party's claim, but Defendants then fail to explain why Gentles's affidavit doesn't fit the bill. Defs. Br. 23-24 (citing *Paladino v. Newsome*, 885 F.3d 203, 206-07 (3d Cir. 2018)). Under Defendants' own reading of *Paladino*, a jury could find Gentles's affidavit nonconclusory. His statement that he "walked … with [his] normal gait," JA 84, is a statement of fact that supports an inference contradicting Defendants' claim that Gentles rushed to his car, *see* Defs. Br. 23-24; *see also* Opening Br. 22; *Paladino*, 885 F.3d at 209.

Further, Gentles confirmed in his deposition that he had been merely "walking to [his] car." JA 54. The district court appeared to disregard this and other evidence because of Gentles's alleged failure to comply with the requirements set forth in the court's Pro Se Guidelines. *See* Opening Br. 22 n.10; Defs. Br. 24. To the extent it did so, the district court was wrong. The Pro Se Guidelines sent to Gentles did not include a rule requiring pinpoint citations. *See* Opening Br. 22 n.10. Defendants counter that an

appellate court owes deference to a district court's interpretation of its own local rules, Defs. Br. 24, but a district court may not read a new requirement into the local rules when they are silent on that subject, *see* JA 11-15; E.D. Pa. Local Civil Rules.[1]

Second, Defendants argue that even accepting Gentles's affidavit as valid evidentiary support, Gentles did not sufficiently dispute that he had "rushed" to his car by stating that he "walked" to it. Defs. Br. 22-24. That's because, according to Defendants, "there is no dispute Gentles was attempting to quickly leave." Defs. Br. 23. With respect, that's nonsense. Gentles said he walked at his "normal" gait in his affidavit. JA 84. Defendants' attempt to respond by citing a part of Gentles's deposition is self-defeating because the cited language has nothing to do with the speed with which Gentles walked to his car. *See* Defs. Br. 22 ("I saw a police officer in a marked car pull up. … I didn't want to be around police involvement at the time. … So I started walking to my car, … and I think I may have waved and got into my car." (quoting JA 54)).[2]

Lastly, Defendants claim that whether Gentles walked or rushed does not matter because Gentles "abruptly terminated his conversation with Mr. Barber and attempted to depart the area," which was "nervous or

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[1]https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/civil/cvrules.pdf.

[2] Defendants' brief incorrectly quotes Gentles's deposition in a few places, but those mistakes don't affect the substance of the quoted passages. *See* JA 54.

evasive behavior." Defs. Br. 19. For support, Defendants cite to *United States v. Coleman*, 383 F. App'x 180 (3d Cir. 2010), where "nervous or evasive behavior" was one of four factors that bolstered an otherwise insufficient tip. Defs. Br. 18-19 (quoting *Coleman*, 383 F. App'x at 185).

But a jury could find that Gentles's conduct was not "nervous or evasive" behavior that supports reasonable suspicion. *Coleman*, 383 F. App'x at 185; *see* Opening Br. 23-24. In *Coleman*, officers had reasonable suspicion based, in part, on the defendant's "nervous or evasive behavior": He maneuvered his body in a way that suggested he was trying to conceal an object. 383 F. App'x at 181-82. Gentles did not conceal items on his body or otherwise act unusually. Instead, he responded to Portock's greeting and waved while walking to his car. JA 54.

Besides, in *Coleman*, innocent reasons could not explain the defendant's behavior, *see* 383 F. App'x at 181-82, 185-86, whereas innocent reasons could explain why a Black man like Gentles would want to walk away from police officers, *see United States v. Navedo*, 694 F.3d 463, 471 (3d Cir. 2012); Opening Br. 23. Thus, contrary to Defendants' assertion, Defs. Br. 16 n.5, this case is more like *J.L.* (where reasonable suspicion was lacking) than *Coleman*. Like J.L., Gentles "made no threatening or otherwise unusual movements" when he engaged in the innocent conduct of walking away from an officer. *J.L.*, 529 U.S. at 268.

And even if Gentles's walking away from Portock could be considered nervous or evasive, that alone would not have been enough to create reasonable suspicion. *Contra* Defs. Br. 19 (citing *United States v. Valentine*, 232 F.3d 350, 357 (3d Cir. 2000); *United States v. Garvin*, 548 F. App'x 757, 760-61 (3d Cir. 2013)).

Defendants' cases prove our point. In *Valentine*, the officers received a face-to-face tip that was "more reliable than an anonymous telephone call" and then found the suspects in a high-crime area at 1:00 a.m. 232 F.3d at 354, 357. Thus, the suspects' decision to walk away after noticing the police car was not the only factor contributing to reasonable suspicion. *Id.* at 357. And, in *Garvin*, only when "taken together" did the corroborated "tip, the lateness of the hour, the officers' experience, the abrupt change of direction … upon seeing a marked police vehicle, and [the] attempt to enter someone else's home upon being approached by [o]fficers" give rise to reasonable suspicion. 548 F. App'x at 760-61. The additional factors in those cases—the late hour, the individual's presence in a high-crime area, and a reliable tip—are not present here. *See* Opening Br. 23.

* * *

No single fact on its own could have provided Portock with reasonable suspicion that Gentles had engaged in or was about to engage in criminal activity, and looking at the facts in their totality does not change anything. *See* Opening Br. 24-25.

At the moment of seizure, Portock knew only this: An anonymous caller had reported that a Black man was looking in garages in a public alley before driving off. Nothing suspicious was happening in the alley when Portock checked it. Ten minutes after that, when Portock spotted Gentles's parked car in a residential neighborhood about a mile from the alley, Gentles was chatting with someone on the sidewalk. Gentles then ended the conversation with Barber, walked toward his car, and waved at Portock before getting in. When Portock reached the car, Gentles was not sitting in it alone: Flores sat in the passenger seat, and two young children sat in the back. And the events did not occur in a high-crime area with a history of burglaries. All told, a jury could find that no reasonable officer could have suspected Gentles of engaging in criminal activity.

C. The officers extended the investigation beyond the bounds of a *Terry* stop.

The officers here did not use the least intrusive means or investigate diligently, so they exceeded the bounds of a *Terry* stop. Opening Br. 25-26. Although officers may use more intrusive methods if necessary to neutralize danger, *Terry v. Ohio*, 392 U.S. 1, 24 (1968), Defendants do not argue that the officers handcuffed and locked up Gentles for safety reasons, *see* Opening Br. 29-30; Defs. Br. 19-22. Instead, Defendants argue that the intrusiveness and duration of the stop were reasonable because Gentles refused to identify himself and "disturbed the area."

Defs. Br. 20-21. But the facts here clearly show the investigation exceeded the bounds of a *Terry* stop and became an arrest, and Defendants do not dispute that Portock himself acknowledged this in his incident report. Opening Br. 30 (citing JA 42, 45). Defendants claim that if the stop did turn into an arrest, the officers had probable cause to arrest Gentles. Defs. Br. 8, 21-22. They are wrong on all counts.[3]

Intrusive methods and lack of diligence. The officers acted unreasonably because they failed to use less intrusive methods of investigation and did not diligently pursue methods that were likely to quickly confirm or dispel any suspicions. Opening Br. 27-28. Defendants argue the officers' actions were reasonable because Gentles refused to identify himself, would not answer questions, and "disturbed the area," forcing the officers to extend the stop and lock Gentles in the patrol car. Defs. Br. 20-21. All of these arguments fail.

We previously explained that Gentles did not have to identify himself and engage with the officers, Opening Br. 24 & n.11, and we explain below why Section 1511(a) of the Pennsylvania Motor Vehicle Code does not change this analysis, *infra* at 20 (discussing 75 Pa. Cons. Stat.

[3] Defendants argue Unruh is entitled to dismissal because "no evidence has been established through initial discovery, or through the cell phone video of any violation of Gentle[s]'s federal or state law rights." Defs. Br. 10 n.4. But Gentles's deposition indicates that Unruh helped Portock handcuff and detain Gentles. JA 58. And Unruh is clearly visible in the video. JA 88 (7:43-7:46); Opening Br. 7 n.7. Thus, a jury could find both Unruh and Portock liable.

§ 1511(a)). Defendants' argument that Gentles and Flores became willing to answer the officers' questions only because of the lockup, Defs. Br. 21, is, charitably put, counterfactual. Before the officers handcuffed Gentles, Flores had already explained to them that Gentles had been in the car with her all day, was the owner of the car, and had been visiting his new house with his family. JA 57, 59. And Gentles would have answered the officers' questions prior to being handcuffed had Portock explained what he was investigating. JA 60.

Nor does "disturb[ing] the area" justify the scope of the stop. *Contra* Defs. Br. 20-21. For starters, Gentles never disturbed the area—or at the least, a reasonable jury could find as much. Opening Br. 36-38; *infra* at 19-22. But even accepting Defendants' characterization, any disturbance could have occurred only after the officers handcuffed Gentles and started emptying his pockets. Although Portock claims otherwise, JA 45, a jury could determine that Gentles had not yelled before Portock handcuffed him, *see* JA 57-59; JA 88 (4:15-5:30). So, disturbance of the area cannot have been the officers' real reason for handcuffing Gentles.

On top of that, locking Gentles in the patrol car for twenty minutes was neither the least intrusive nor the most diligent method for dispelling suspicion. *See Florida v. Royer*, 460 U.S. 491, 500 (1983). The officers could have checked his identification without locking him in the car, and they could have explained the situation to Gentles and asked him what he was doing in the alley—something they never did and could

not have done once he was in the patrol car with the doors shut and windows rolled up. JA 60, 63. Instead, the officers took Gentles's wallet and identification before locking him in the patrol car, JA 58, and, after a round of appellate briefing, they still have yet to explain what they were doing with his identification for twenty minutes after that.

Probable cause. We have just shown that the officers exceeded the lawful scope of a *Terry* stop. Defendants argue that, even if this is true, the officers had probable cause to arrest Gentles. Defs. Br. 8, 21-22. But Portock lacked reasonable suspicion to begin the seizure, *see supra* at 13-14, and nothing he learned in the next thirty minutes could have created probable cause. Opening Br. 30-31. Because there was no probable cause, Portock was not justified in conducting a search incident to arrest to obtain Gentles's identification. *Contra* Defs. Br. 21-22 (citing *Chimel v. California*, 395 U.S. 752 (1969)).[4]

D. Defendants are not entitled to qualified immunity.

Portock violated Gentles's clearly established rights to be free from (1) an unreasonable seizure based on nothing more than an unreliable anonymous tip and observations of innocent actions and (2) a seizure that exceeded the lawful scope of a *Terry* stop without probable cause.

[4] Defendants maintain Portock had probable cause to cite Gentles for disorderly conduct by unreasonable noise. Defs. Br. 9. That is incorrect for the reasons stated below (at 19-22) and in our opening brief (at 34-40).

Opening Br. 32. Defendants respond, first, by arguing that "no violation occurred." Defs. Br. 28. That's wrong for reasons explained above (at 3-17).

Second, Defendants argue that no clearly established right prevents an officer from investigating an individual identified by a tipster who attempts to leave the scene after seeing a uniformed officer come his way. Defs. Br. 28. But a reasonable officer would have known that an unreliable anonymous tip that did not report any plausibly illegal activity cannot support reasonable suspicion. *See* Opening Br. 32 (citing *Johnson v. Campbell*, 332 F.3d 199, 209 (3d Cir. 2003)). A reasonable officer would also have known that Gentles's attempt to avoid police interaction was not suspicious, particularly when he had been chatting on the sidewalk, his children were in the car, and the interaction occurred during the day. *See* Opening Br. 32 (citing *Brown v. Texas*, 443 U.S. 47, 48, 52 (1979); *Duffy*, 446 F.3d at 495; *Campbell*, 332 F.3d at 208). Defendants do not address this case law indicating that the presence of children in the car and the time of day should have reduced suspicion for any reasonable officer.

The officers also violated Gentles's clearly established right to be free from seizures that exceed the lawful scope of a *Terry* stop without probable cause. Opening Br. 32-33; *see supra* at 14-17. Defendants argue that it is not clearly established that a twenty-to-thirty-minute stop during which the suspect is uncooperative exceeds the scope of a *Terry*

stop, citing a case in which a Pennsylvania intermediate court determined a fifteen-minute *Terry* stop was not excessive. Defs. Br. 28-29 (citing *Commonwealth v. Dangle*, 700 A.2d 538, 540 (Pa. Super. Ct. 1997)). But the stop here lasted nearly thirty minutes—roughly double the length of the stop in *Dangle*. JA 63. More importantly, the officer in *Dangle* was actively investigating during the stop by administering sobriety tests. *Dangle*, 700 A.2d at 541. In contrast, Portock and Unruh used excessively intrusive methods and did not even attempt to investigate. *See supra* at 15-17; Opening Br. 32-33; JA 59. A reasonable officer would have known that is illegal. *See Florida v. Royer*, 460 U.S. 491, 500 (1983); *Terry v. Ohio*, 392 U.S. 1, 1919 (1968).

II. The district court erred in granting Portock summary judgment on Gentles's state-law malicious-prosecution claim.

On Gentles's state-law malicious-prosecution claim, the parties dispute only whether Portock (1) had probable cause to issue Gentles a citation for disorderly conduct by unreasonable noise and (2) acted with actual malice when he did so. Opening Br. 33; Defs. Br. 25-27. A reasonable jury could find for Gentles on both counts.

A. Portock did not have probable cause to issue Gentles the disorderly conduct citation.

In determining whether probable cause existed, a preliminary question is what conduct may be considered to support the disorderly

conduct citation. *See Commonwealth v. Beattie*, 601 A.2d 297, 301 (Pa. Super. Ct. 1991). Because Portock unlawfully stopped Gentles, Gentles's subsequent conduct resulting from the unlawful stop could not be the basis for a disorderly conduct citation under Section 5503(a)(2). Opening Br. 34 (citing *Beattie*, 601 A.2d at 301).

Defendants' only counterargument is that the stop was lawful because Section 1511(a) of the Pennsylvania Motor Vehicle Code obligated Gentles to provide his identification. Defs. Br. 27-28 (citing 75 Pa. Cons. Stat. § 1511(a)). That's wrong. To begin with, as shown above (at 13-14), the stop was unlawful because the officers lacked reasonable suspicion to stop Gentles in the first place. *See Brown v. Texas*, 443 U.S. 47, 52-53 (1979). So Gentles's subsequent refusal to identify himself could not have provided Portock with probable cause for a disorderly conduct citation. *Id.*[5]

Even if the stop was lawful (which we dispute), Portock still did not have probable cause to believe that Gentles engaged in disorderly conduct by unreasonable noise. Section 5503(a)(2) has an act requirement and an intent requirement, both of which must be met.

[5] Regardless of whether Portock had reasonable suspicion to stop Gentles, Section 1511(a)—which applies to licensees "when driving a motor vehicle"—does not apply here because Gentles was neither stopped for a traffic violation nor driving his car when stopped. *See Commonwealth v. Chisebwe*, 310 A.3d 262, 268-70 (Pa. 2024) (applying Section 1511(a) to a traffic stop).

Opening Br. 35. Our opening brief shows (at 38-40) that Gentles did not possess the requisite intent to violate the statute. Defendants do not even discuss the statute's intent requirement, effectively conceding the issue.

As to the statute's act requirement, courts typically consider four factors—volume, time of day, duration of noise, and neighborhood response—to determine whether a violation has occurred. Opening Br. 36-38. Each factor weighs in Gentles's favor: His brief outburst, which occurred during the daytime and did not result in noise complaints from neighbors, could not have provided Portock probable cause for a citation of disorderly conduct by unreasonable noise. Opening Br. 36-38.

Defendants maintain that Portock had probable cause because the video shows that Gentles's conduct disturbed the neighborhood, as evidenced by (1) people, including children, coming out of their houses; (2) neighbors' chatter, which can be heard in the background; and (3) a neighbor looking out his window. Defs. Br. 26.

But neither the video nor any other evidence shows people coming out of their homes *because of* Gentles's conduct. In fact, the video does not show any people coming out of their homes at all and instead just shows that there were people outside. *See* JA 88 (2:11). In his deposition, Gentles categorically denied that people started coming out of their homes and affirmatively stated that people were already outside "going about their normal life." JA 60-61. The video also does not show that the neighbors' background chatter had anything to do with Gentles's conduct,

so a reasonable jury could easily reject Defendants' contention on that score. Lastly, the video does not show that the neighbor who was looking out his window did so *because of* Gentles's conduct. *See* JA 88 (4:51). A jury could find that the neighbor was instead looking out because of the heavy police presence in the neighborhood. *See* Opening Br. 6-7 (noting that at least four officers responded to Portock's call for backup).

Defendants' apparent reliance on *Farmer v. Decker* to argue that Portock had probable cause to arrest Gentles for a disorderly conduct citation is badly misplaced. *See* Defs. Br. 21 (citing *Farmer v. Decker*, 353 F. Supp. 3d 342 (M.D. Pa. 2018)). In *Farmer*, a woman informed the police about a man who was loudly cursing at her children, and she provided the officers with the contact information of witnesses who later corroborated her description of the event. 353 F. Supp. 3d at 347-48. In contrast, no neighbor complained about Gentles's conduct, and Gentles did not loudly curse at children. Opening Br. 38.

Defendants assert that Gentles's statement that the volume of his speech did not cause a public nuisance or disturbance is a "self-serving conclusion" contradicted by the video. Defs. Br. 26-27. But the video does not contradict Gentles's statement or show that any neighbor was disturbed by Gentles's conduct. *See* JA 88 (3:30-3:50; 4:21-4:56, 5:12-5:28).

B. Portock acted with actual malice.

Our opening brief shows (at 40), and Defendants do not dispute, Defs. Br. 29, that a jury may infer actual malice from a lack of probable cause. Defendants argue only that Portock did not act with actual malice because he had a good-faith belief that Gentles's conduct caused or risked a public disturbance, as evidenced by neighbors coming out of their homes to watch Gentles's encounter with the officers. Defs. Br. 29.

Defendants are doubly wrong. First, Portock's purported good-faith belief is insufficient to preclude a finding of actual malice at summary judgment when, as here, probable cause remains disputed and actual malice may be inferred from a lack of probable cause. *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993). Second, as just discussed (at 21-22), a jury could find that (1) the neighbors were already outside, or (2) even if the neighbors did come outside, it was not *because of* Gentles's conduct but because of the heavy police presence. And neighbors coming out to watch still does not amount to public disturbance, *see Commonwealth v. Gilbert*, 674 A.2d 284, 287 (Pa. Super. Ct. 1996), because a jury could find that it is perfectly normal for people to watch when police cars pull up outside their homes and multiple officers interrogate and detain a person.

C. Portock is not entitled to official immunity.

The parties agree that local agency employees lose their immunity under Section 8546(2) if they act with actual malice. Opening Br. 40-41

(citing 42 Pa. Cons. Stat. §§ 8546(2), 8550); Defs. Br. 29. Defendants dispute only whether Portock acted with actual malice. Opening Br. 40; Defs. Br. 29. As explained above (at 22), a jury's finding of a lack of probable cause could also lead to a determination that Portock acted with actual malice. Opening Br. 41 (citing *Eckman v. Lancaster City*, 742 F. Supp. 2d 638, 657 (E.D. Pa. 2010)). The official-immunity question must therefore go to a jury.

Conclusion

This Court should reverse and remand for trial on each of Gentles's claims.

Respectfully submitted,

/s/ Regina Wang

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